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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

No. 12.

THE UNITED STATES OF AMERICA,
*Petitioner,*

*v.*

APPALACHIAN ELECTRIC POWER COMPANY,
*Respondent.*

## PETITION FOR REHEARING.

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January 10, 1941.

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THE UNITED STATES OF AMERICA,
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APPALACHIAN ELECTRIC POWER COMPANY,
*Respondent.*

## PETITION FOR REHEARING.

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Comes now the above-named Respondent, Appalachian Electric Power Company, and presents this its petition for rehearing of the above entitled cause and, in support thereof, respectfully shows:

### Summary of Grounds of Petition.

FIRST: As Respondent understands the petition, briefs and oral argument in this Court, *the reversal* of the concurrent finding that New River is not navigable in fact in interstate commerce *rests upon propositions of law which were not presented to this Court by petition, brief or oral argument;* and therefore *neither Respondent nor the States* appearing as *amici curiae* herein *have been heard thereon.*

SECOND: The definition of navigable waters of the United States now enunciated by this Court for the first time is squarely in conflict with all relevant prior decisions of this Court and with well-settled Constitutional principles.

THIRD: Even under the definition of navigable waters so enunciated, New River, upon the facts established by the record, is not a navigable water of the United States.

FOURTH: The definition of navigable waters announced herein is in fact unworkable, transfers to Congress the

power and duty vested by the Constitution in the Federal courts to determine the Constitutional facts as to navigable waters of the United States, destroys the valuable rights of States and their citizens in waters plainly non-navigable under the long established law and destroys our dual system of government in a wide field.

FIFTH: The principles announced also extend the Constitutional authority of the United States in relation to navigable waters far beyond the limits previously set by the decisions of this Court, destroy the rights of the States and their citizens in such waters and set aside the principle, which has prevailed since the foundation of our Government, that the Federal Government may not exercise authority not granted to it. If the announced principles be applied, as logically they must be, to all other natural resources of the States, they will destroy our dual constitutional system in a far wider field.

## Specific Grounds Urged in Support of Petition, with Supporting Reasons.

### I.

### Navigability Vel Non of New River.

The Court erred in reversing the concurrent finding of the lower courts that New River is not navigable in fact in interstate commerce and their concurrent holding that consequently New River is not a navigable water of the United States.

The reversal of this concurrent finding and holding rests upon several fundamental errors, the public importance of some of which can not be overstated if our Constitutional system is to be preserved and the basic law upheld unless and until changed by orderly processes of amendment.

### A.

The Court erred in holding that a stream not navigable in fact in its natural and ordinary condition is nevertheless

a navigable water of the United States provided that the stream can be made navigable by artificial means at a cost which balances the "need at a time when the improvement would be useful" (p. 8).[1]

1. The opinion cites no decision of this Court which supports the foregoing proposition; and we know of none. On the contrary, all decisions of this Court upon the subject impliedly, and many of them expressly, deny its validity. The Court accepts the decision in *The Daniel Ball*, 10 Wall. 557, as stating the "basic concept of navigability." In that case this Court, in considering the navigability of Grand River, Michigan, said that streams to be navigable in law must be navigable in fact "in their ordinary condition" (l.c. 563). The Grand River, which empties into Lake Michigan, had not been artificially improved but was navigable in fact and actually navigated by steam-boats for 40 miles above its mouth. The opinion plainly referred to use or susceptibility for practical use under natural and ordinary conditions; and it has ever since been so construed by this Court.

Thus in *The Montello*, 20 Wall. 430, although the Fox River had been artificially improved by locks and dams, this Court applied the test of navigability in fact under natural and ordinary conditions. This Court, construing and applying the definition of navigability enunciated in *The Daniel Ball*, said:

> "If it be capable *in its natural state*[2] of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, * * *" (l.c. 441).

[1] Numbers in parenthesis, accompanying references to this Court's opinion or to quotations therefrom, are those of pages of the opinion as printed and sent to counsel for Respondent.

[2] All italics are supplied unless otherwise specifically indicated.

And, after pointing out that a large and extensive commerce had been carried over the river "in its natural state" (l. c. 442), the Court further said:

> "* * * but the vital and essential point is whether the *natural navigation* of the river is such that it affords a channel for useful commerce" (l. c. 443).

In *United States* v. *Cress*, 243 U. S. 316, this Court, after an exhaustive review of the cases, said:

> "Many state courts, including the Court of Appeals of Kentucky, have held, also, that the legislature can not, by simple declaration that a stream shall be a public highway, if in fact it be not navigable *in its natural state*, appropriate to public use the private rights therein without compensation. (Citing numerous cases)
>
> "This Court has followed the same line of distinction. That the test of navigability in fact should be applied to streams *in their natural condition* was in effect held in *The Daniel Ball*, 10 Wall. 557 * * *.
>
> * * * * * *
>
> The point was set forth more clearly in *The Montello*, 20 Wall. 430, * * *. It was argued (p. 440) that although the river might now be considered a highway for commerce conducted in the ordinary modes, it was not so in its natural state, and therefore was not navigable water of the United States within the purview of *The Daniel Ball* decision. The Court, accepting navigability *in the natural state* of the river as the proper test, proceeded to show that, even before the improvements resulting in an unbroken navigation were undertaken, a large and successful commerce had been carried on through this river * * *" (l. c. 322-3).

And further:

> "It follows from what we have said that the servitude of privately-owned lands forming the banks and bed of a stream to the interests of navigation is a natural servitude confined to such streams

as *in their ordinary and natural condition are navigable in fact* and confined to the natural condition of the stream" (l. c. 325-26).

In *Economy Light & Power Co.* v. *United States*, 256 U. S. 113, this Court again reviewed the authorities and stated the test to be "whether the river, *in its natural state*, is used, or capable of being used as a highway for commerce over which trade and travel is or may be conducted in the customary modes of trade and travel on water" (l. c. 121-2).

The proposition now enunciated by this Court was specifically rejected by the Circuit Court of Appeals in *Brewer Oil Co.* v. *United States*, 270 Fed. 100, 102-3. In this Court, Oklahoma (intervenor) urged that the evidence established that "the Arkansas River by proper improvements, could be made navigable by vessels of light draft" and "that the testimony shows that the river may be made navigable at the place in controversy." Oklahoma Brief, 81, 129. In affirming the decree, this Court said that navigability depends "upon the fact whether the river *in its natural state* is such that it affords a channel for useful commerce" and that "Neither the argument nor the record discloses any ground which can overcome the weight which the finding of two courts must have with us". *Brewer-Elliott Oil Company* v. *United States*, 260 U. S. 77, 86.

Again, in *United States* v. *Holt Bank*, 270 U. S. 49, this Court said:

> "The rule long since approved by this Court *in applying the Constitution* and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, *in their natural and ordinary condition*, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; * * *" (l. c. 56).

Finally, in *Arizona* v. *California*, 283 U. S. 423, 452, (an original suit) this Court stated

> "whether a stream is navigable in law depends upon whether it is navigable *in fact*." (l. c. 452)

It is hardly to be supposed that Mr. Justice Brandeis would have engaged in the burdensome labor of examining all of the numerous documents cited in the foot-notes to his opinion for the purpose of determining the extent of actual navigation on the river, or would have relied upon historical navigability in fact if, as the present decision announces, his inquiry should really have been directed to the question of whether the river could be made navigable by expenditure of a sufficient amount of money and, if so, whether in his opinion the cost would have been commensurate with the need.

Stated in other words, the unbroken line of decisions of this Court has up to this time held that navigability-in-fact is *essential to navigability-in-law*. Yet the Court now says in effect that, to be navigable-in-law, a stream need not in fact be navigable and that a mere possibility that the stream may artificially be made navigable at some future time at reasonable cost is sufficient.

We have not overlooked the fact that the opinion (p. 9) directs the reader to compare *Barnes* v. *United States*, 46 Ct. Cl. 7, 28. The case was never cited in any of the Government briefs; and it seems that it has never before been cited by any court on this point, not even by the Court of Claims. The statement in the *Barnes* case is based upon an obvious misinterpretation of both the facts and the decision in *The Montello* case, as abundantly appears not only from a reading of *The Montello* case but also from the subsequent expositions of *The Montello* case by this Court in the decisions hereinabove cited.

2. As legislative support for its new pronouncement, the Court cites (p. 8) the definition of navigable waters contained in Section 3(8) of the Water Power Act. The instant decision reaffirms the well-established principle that Federal navigability is a Constitutional fact. It follows that, if this statutory definition is construed to include waters not navigable in interstate commerce, it is manifestly unconstitutional. *United States* v. *Cress*, 243 U. S. 316, 322; *Crowell* v. *Benson*, 285 U. S. 22, 55. The Court appears to construe the phrase in the aforesaid definition, "which either in their natural or *improved* condition * * * *are* used or suitable for use for the transportation of persons or property in interstate or foreign commerce", as a declaration that there shall be regarded as navigable any waters which, though non-navigable, can be made navigable by artificial means. This, we respectfully submit, is a clear misconstruction of the definition.

This part of the definition plainly applies only to waters which either *are* naturally navigable in fact or *have been* made navigable interstate by artificial means, i. e., are (already) in an improved condition. It does not apply to non-navigable waters which *could be* made artificially navigable.

Of course, no one questions the Constitutional authority of the United States to construct an interstate navigable waterway as an instrumentality of interstate commerce, either by means of a canal entirely over dry land or by utilizing the bed of a non-navigable stream, just as the Federal Government could construct a transcontinental railroad as an instrumentality of interstate commerce. *California* v. *Pacific R. R. Co.*, 127 U. S. 1. But in either case compensation would have to be paid for property taken. *United States* v. *Cress, supra* (l.c. 326). Such an artificial interstate waterway would of course be a navigable water of the United States.

3. The opinion states:

> "It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce" (p. 9).

We understand these statements to be advanced as a foundation for the proposition under discussion, i. e., that a stream not navigable in fact in its natural condition is nevertheless navigable in law if it can be made actually navigable at a reasonable expense. So understood, the statements seem plainly to confuse the circumstance that Federal power extends over interstate navigation upon all interstate navigable waters, whether naturally or artificially navigable, and the fact that Federal authority over navigation does not extend to non-navigable waters merely because therein, by lawful procedure and payment of compensation for property and rights taken, there may be created an artificial interstate navigable waterway which would thereupon come under the jurisdiction of Congress. Where an artificial interstate waterway has actually been created, there has been no increase of Federal power over navigation in the abstract sense but there has been brought into being a new subject upon which the Federal power over navigation may operate.

4. In support of the definition now enunciated, the Court states:

> "An analogy is found in admiralty jurisdiction, which may be extended over places formerly non-navigable" (p. 9).

The cases[1] cited by the Court merely hold that the old Illinois and Michigan Canal and the Erie Canal, waters admittedly navigable in fact in interstate commerce, are sub-

[1] *The Robert W. Parsons*, 191 U. S. 17; *Ex Parte Boyer*, 109 U. S. 629; *Marine Transit Co.* v. *Dreyfus*, 284 U. S. 263.

ject to the admiralty jurisdiction of the United States courts. This, we submit, furnishes not the slightest support for the proposition that admiralty jurisdiction, or any Federal jurisdiction dependent upon the existence of navigable waters, extends to non-navigable waters merely because they could be made artificially navigable at some unknown expense, assumed to be reasonable.

5. The extent to which this proposition departs not only from long and unbroken lines of decisions of this Court, and from Constitutional principles accepted ever since the foundation of our Government, can not, in our opinion, be overstated. Federal authority over interstate navigable streams has rested upon the fact that they are natural highways of interstate commerce and has been limited to the control of such waters for purposes of navigation. Property rights remained in the States and their people even on navigable streams, and the foregoing has been the Constitutional line of demarcation between the rights of the States and the Federal Government even in navigable waters (Resp. Br. 109-112). All rights in non-navigable waters were vested in the States and their citizens. It is, we submit, perfectly obvious that the proposition now enunciated by the Court for the first time and in conflict with all relevant prior decisions of this Court deprives the States and their people of all governmental and proprietary rights in the valuable water powers and other resources of that great mass of streams which have been known as non-navigable under the established law of the land.

There is scarcely a stream with any appreciable flow, no matter how impossible of use in its natural state, which could not at some cost, however great, be canalized for some kind of navigation. According to the opinion, flow and gradient are the only natural conditions to be considered (p. 8). But not even the volume of water would be

controlling; for engineering science long ago learned to supply necessary water by head-water reservoirs and other expedients. Certainly under this rule it is difficult to understand why the question of gradients would be material; for obviously, by building dams in sufficient number and to a sufficient height, any gradients on any stream in the land could be overcome.

The purported limitation that "There must be a balance between cost and need at a time when the improvement would be useful" (p. 8) is plainly illusory. It is a limitation in form of words but none in law or in fact, for the following reasons:

*First,* Federal navigability is, and always has been, a Constitutional fact which delimits in many aspects the scope of Federal Constitutional authority. However, this purported judicial and Constitutional definition of Federal navigable waters sets up criteria which, were they susceptible of practical application, would fall solely within the field of legislative determination and wholly outside the sphere of judicial action. Under the settled law, Congress is the sole judge of such questions as whether the cost of artificial improvements on streams, navigable or non-navigable, is justified by the probable or assumed benefits. *Arizona* v. *California,* 283 U. S. 423, 455-6. Obviously, therefore, under the definition now enunciated, the question whether a stream non-navigable in its natural condition may be made artificially navigable at a reasonable cost will be solely for the determination of the Congress. The inescapable consequences of the decision are to transfer to the Congress the power and duty vested by the Constitution in the Federal courts to safeguard and preserve our Constitutional system in this wide field.

*Second,* the rule, even if it fell within the scope of judicial determination, would be wholly impossible of application. In the case of a non-navigable stream claimed to be

susceptible of being made navigable by artificial improvements, how is the Court to say what structures would be necessary to make the stream useful for interstate commerce, or at what cost they could be provided? How is the Court to determine what would be the value of the "need at a time when the improvement would be useful" (p. 8). Indeed, how is the Court to determine when the "time when the improvement would be useful" (p. 8) will arrive? Obviously such a rule, if it stated a principle within the field of judicial action, would engage the Court in a maze of speculation, conjecture and prophesy.

Thus, in the instant case: What is the nature, scope and extent of the artificial improvements which will be necessary to make New River thus navigable? What is the time "when the improvement would be useful"? What will be the character and cost of the artificial improvements necessary at that unknown time? What will be the value of the "need" at that unknown time? Will the unknown value of the need at this unknown time balance the unknown cost of the undeterminable improvements necessary?

6. This new proposition of law (completely destructive of the proprietary and sovereign rights of the States and of the proprietary rights of Respondent and other riparian owners under the law as it has been previously enunciated by this Court as well as the State Courts generally and understood by the profession) has been promulgated without any opportunity to Respondent or to the States to be heard upon this vital issue.

As we read the Government's petition and briefs in this Court, no such proposition as that now enunciated was therein urged. As we understood the argument, no such proposition was urged by the Solicitor General before this Court but rather it was expressly disclaimed by him. That Respondent's understanding in this respect was fully shared by the States appearing herein as *amici curiae* is,

we think, clear from a reading of their briefs. Obviously, had either Respondent or such States understood that such an issue was raised before this Court, the proposition would have been fully briefed and argued by both and shown to be untenable under the decisions of this Court. Manifestly, in the light of the fact that, as hereinbefore shown, the proposition is at war with all the relevant previous decisions of this Court, neither Respondent nor the States could anticipate the enunciation of such a rule. Plainly a rehearing should be granted and Respondent and the States should be given an opportunity to be heard—particularly in view of the destructive effect of the proposition upon the rights of Respondent, the States and riparian owners generally.

Since, as we believe, no such issue was presented to this Court in petition, brief or oral argument, it is, we think, immaterial whether such an issue had been raised in the courts below and abandoned here. However, as we understand the record and proceedings in the lower courts, the proposition now enunciated was not urged by the Government in either court.

In the District Court, the Government requested no findings which would embody the indispensable factual bases for application of the rule now promulgated, and no conclusion of law which embodied such a proposition in any form (R. 84, *et seq.*). No error was assigned by the Government to the failure of the District Court to make any of the findings which are necessary for the application of the rule now announced for the first time. The only reference to any subject-matter even remotely related to the subject-matter of the rule, advanced in the Government's 556-page brief in the Trial Court, was an argument (based upon a misconception of the rule that navigability shall be determined under natural and ordinary conditions) that artificial improvements do not destroy the "ordinary

condition" of a stream until the stream has been fully canalized (pp. 29-30).

In the court below, the Government stated that "the presence of falls and rapids, shoals and sandbars," may constitute "evidence against navigability" although asserting that such obstacles do not "necessarily establish non-navigability" (Pet. Supp. Br. below 34-35) and further that "there is little or no disagreement with the court below (District Court) as to the meaning of 'navigable waters of the United States'" (Pet. Supp. Br. below 31). In reference to a statement in Respondent's brief below, to the effect that the Government apparently contended "that a river is a navigable water of the United States if it would be possible to make it navigable by artificial means", the Government stated categorically: "We did not make such a contention" (Pet. Reply Br. below 2, footnote 3).

While it would be immaterial that a proposition not presented or argued in this Court had once been urged in a court below, Respondent was, we think, fully justified in its understanding that no such proposition had been presented in either court below.

7. From the practical standpoint, the outstanding characteristic of the newly enunciated criterion as to navigability in law is that, *however non-navigable* a stream may be *in fact* and no matter whether the sovereign rights of a State and the property and riparian rights of a State and its citizens have been exercised and relied upon in the light of such non-navigability-in-fact, such actions may be nullified and any such rights, investments or values grievously injured, if not destroyed, by some future holding that the stream in point is nevertheless susceptible of being made navigable artificially at a cost held to be reasonable—even though such improvement is a mere possibility and may never take place at all.

The inequitable effect upon an investment, whether State or private, is typified by the instant case. Here Respondent made its investment of over $1,000,000. in lands and riparian rights for the Radford project in light of the commonly recognized fact that New River is not navigable-in-fact in interstate commerce. The earlier acquisitions by the immediate predecessor of Respondent were made at a time when the Chief of Engineers of the War Department had in a report of July 13, 1911, stated to the Secretary of War:

> "There has been no useful navigation on New River at any time, and none is possible under existing natural conditions, nor without the expenditure of vast and prohibitive sums in improvement work." (Ex. 566, R. 2844)

The Federal Power Commission, after mature consideration and in the light of the December 29, 1925, report of the Chief of Engineers, General Harry Taylor (Ex. 97, R. 2528-32), itself on June 1, 1927, had made a finding of non-navigability (Ex. 97, R. 2492-4). Again in July, 1930, the Commission certified to the Attorney General of the United States that:

> "New River is neither navigated nor navigable in fact" (Ex. 531, R. 2779).

The investment of the many millions of dollars involved in the actual building of the dam was not begun until, at the instance of the State of Virginia, the Engineers of the War Department had again made an exhaustive examination of the question as to whether New River is navigable in fact. That examination took place because the Federal Bureau of Roads had raised the question as to whether War Department authorization was necessary for highway bridges across New River, including a bridge at Glen Lyn, Virginia. The ensuing October-November, 1930, reports by the District Engineer (Ex. 579-B, R. 2862), the Division Engineer, Col. Spalding (Ex. 579-C, R. 2864), and the Chief

of Engineers, Gen. Brown (Ex. 539-B, R. 2795-6), had put on record their findings that *New River is not navigable in fact at any point of its course.*[1]

Respondent recognized that administrative attitudes and actions are not conclusive in regard to navigability. However, Respondent, in view of the attitude and the April, 1931, order of the Federal Power Commission, had attempted to obtain a judicial determination of the matter in controversy, in which attempt it had been unsuccessful[2]; and it believed that such unbroken line of considered opinions by Federal officials and agencies holding New River non-navigable in interstate commerce fully confirmed the conclusions which it had reached as the result of its own investigations. Accordingly in 1934 it began this investment of additional millions, the dam being completed in 1939. And now, under a holding by this Court, in pursuance of its newly enunciated criterion, Respondent is, under penalty of complete abatement of its dam, required to subject itself to a license with exceedingly onerous, and in our view confiscatory, conditions.[3] The terms of this license are destructive of riparian rights, State and private, which throughout historical times and until now have been recognized, along the entire length of New River and by Federal as well as by State Governments, as appertaining to a stream Federally non-navigable. The license conditions

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[1] To be sure the Federal Power Commission subsequently in 1932, during the pendency of the so-called first New River case, had without notice or hearing adopted a self-serving resolution to the effect that New River is navigable. But such action was obviously nothing more than an attempt to bolster its position in the pending litigation. (Op. District Court, R. 140.)

[2] *Appalachian Electric Power Co.* v. *Smith*, 67 F. (2d) 451, cert. denied, 291 U. S. 674.

[3] In this connection it is of interest to note that the dam involved in *Economy Light Co.* v. *United States*, *supra*, had, during the pendency of that case, hardly been begun and its construction was never carried further.

will greatly reduce, without compensation, the value of Respondent's investment.

A multitude of owners of mills and manufacturing establishments, as well as other water-power developments, old as well as modern, small as well as large, located along and utilizing the waters of streams similarly non-navigable in fact but, under the instant decision of this Court, subject to being held navigable, are faced with similar contentions and possibilities of abatement without compensation or imposition of like Federal licenses.

**B.**

The Court erred in finding that, under the definition of navigability enunciated in the opinion, New River is a navigable water of the United States upon the facts appearing in the record.

1. Under the criterion now announced by this Court "There must be a balance between cost and need at a time when the improvement *would be useful*" (p. 8). We here deal with a stream which is non-navigable in interstate commerce in its natural condition and which has never heretofore been made navigable in interstate commerce by artificial means.

Manifestly, the criterion cannot mean that a stream which is non-navigable in fact is nevertheless navigable in law merely because it be found or assumed that at some time in the past, however remote, it would have been possible to have made the stream navigable, by artificial improvements never made, at a cost which would have balanced a then existent, but since vanished, need. However, the evidence in the instant record clearly establishes that in the past, as well as at present, New River was not susceptible of being made navigable in fact by artificial means at reasonable cost.

In reviewing in summary form the essential showing of the record in respect of the "improvability" of New River, we begin for convenience with the actual attempt artificially to make portions of New River navigable, an attempt which was abandoned far short of completion of the project which had been initiated. In the early Reports of the Chiefs of Engineers, including the 1872 Report cited by the Court in its opinion (p. 15), were contained statements optimistic as to the results which could be accomplished by the project and the reasonableness of the cost thereof. However, as the work progressed, difficulties were encountered, other difficulties appeared in prospect and the funds were expended at rates in excess of those anticipated. The optimism gradually disappeared.

Thus, after the improvement had been under way for two seasons, Captain Cuyler of the United States Engineers in 1879 reported upon the difficulties involved and the inadequacy of the type of improvement contemplated in the original estimates. As to the difficulties, he stated:

> "Here the simple go-ahead work of *blasting* down to a *depth* and *clearing* out *obstructions* is *ineffective, as by as much* nearly as the *bottom* is so *lowered* does the *surface fall shortly afterwards*" (R. 2341).

He concluded that it was necessary

> "to adopt a *more general and radical method* to effect a permanent improvement than has heretofore been tried" (R. 2340).

He recommended the

> "free use of dams to collect into pools the water, which construction should be *much* more elaborate than any heretofore attempted" (R. 2340).

Furthermore Captain Cuyler observed that the open river system of improvement

> "* * * from Hinton up to Sifford, 64 miles * * * will, I think, be found to be but partially applicable," (R. 2341);

instead

> "'the dimensions of the river and of the main falls will necessitate the construction, at these latter, of *locks* and *dams;*" (R. 2341).

In short, as Captain Cuyler stated, after two seasons of actual work on the river, the character of the contemplated improvement had been found to be inadequate

> "even for the *batteau* navigation and *rafting*" (R. 2340).

Great as was the confidence initially as to the adequacy of the estimates of cost and great as was the then purchasing power of the dollar (labor was 10¢-12½¢ per hour, R. 2388), the inadequacy, of the estimated and appropriated sums to accomplish anything worth while, was increasingly realized, until in the 1887 Report the Chief of Engineers pointed out that the estimates and appropriations had been insufficient even to make a proper beginning. He stated:

> "As Congress has never given such a sum of money as would justify the proper *beginning* of a connected project for a continuous navigation from the North Carolina border to Hinton * * *" (R. 2826).

And, as the opinion points out (p. 16), the Radford-Wiley's Falls section was never improved, i.e., was left in its natural condition.

The recognition of the fact that New River could not be made navigable at any reasonable cost is to be found in the War Department Reports for 1900, wherein it is stated:

> "No work has been done on this river since 1889 and the *cost* of further improvement would be *out* of *all proportion* to the benefits to be conferred" (R. 2809).

And again in the same report:

> "The expense of further improvement of the stream, even under the present project, is *very large* in *proportion to the results attained,* since a great deal of rock excavation must be done, while the cost of canalizing the river would be *out of all relation* to the benefits to be derived now or in the near future" (R. 2810).

Statements made in debates in the House of Representatives are to the same effect. Thus, for January 14, 1901, the Congressional Record reads as regards New River:

> "Mr. Burton. This item is included with some 9 or 10 others, on page 86, to be repealed and the amount of the appropriation covered back into the treasury. The committee thought it was time to take up a few of these projects which it was thought were *impracticable,* or, I might say, *absurd,* * * *"
>
> "I want to say to the gentleman from Virginia, further, that $2300. would be a bagatelle in improving *that* river, because the improvement, if any should be made, would be rock excavation, which would cost tens of thousands of dollars *even to make a beginning"* (R. 2810).

Again on January 16, 1901, Mr. Burton stated on the floor of the House:

> "* * * The engineer reports that it is useless to do any work. The stream runs through a rocky gorge, and in order to improve it it will need *expensive* works and very *extensive* rock excavations would have to be made. * * * It seems to me this House should have the courage, in so clear a case as this, after ten years in which not a dollar has been expended and where there is *no probability of any money ever being expended,* to pursue a businesslike course and take it off the books" (R. 2812).

The fact that the river could not be improved at reasonable expense is likewise shown by the statement of the

Chief of Engineers to the Secretary of War dated July 13, 1911, which is quoted in a memorandum for the Secretary of War from the Chief of Engineers dated May 19, 1916, as follows:

> "There has been no useful navigation on New River at any time, and none is possible under existing natural conditions nor without the expenditure of *vast* and *prohibitive* sums in improvement work" (R. 2844).

In 1912 the Board of Engineers for Rivers and Harbors reported (R. 2420):

> "Physical conditions are such that it could not be improved for useful navigation except at *prohibitive* cost."

And Lieut. Col. George R. Spalding, as Division Engineer, reported to the Chief of Engineers under date of October 24, 1930, that New River

> "was not made navigable in fact except for precarious and occasional navigation by the federal improvements, and that it is not now navigable in fact or *capable* of being made so at any *reasonable* expense" (R. 2864).

The present situation clearly appears from a comprehensive report upon the Kanawha River and its tributaries which was made to Congress in January, 1935, by the United States Engineering Department for the specific purpose *inter alia* of determining what, if any, plans of improvement are feasible for purposes of navigation (Original Exhibit 145). That report is one of the series of so-called "308" reports which Congress directed to be made upon practically all navigable rivers and their tributaries in the United States (Act of Congress of January 21, 1927). This report plainly negatives the possibility of making New River navigable in interstate commerce at reasonable cost.

Thus the Division Engineer, Col. Spalding, states:

> "Because of their unfavorable natural characteristics (steep slope and tortuous alignment)[1] none of the tributaries of Kanawha River offer [even] *potentialities* for development in the interests of modern navigation" (R. 2690).

In due sequence the Board of Engineers for Rivers and Harbors reports:

> "*None of the tributaries* [of the Kanawha] because of their unfavorable natural characteristics, are *suitable for development* for navigation, although prior to 1902 the United States expended funds intermittently on some of the tributaries to facilitate rafting and shallow draft navigation" (R. 2684).

And finally the Chief of Engineers, General Markham, with evident recognition of the facts reported by his subordinates, that New River is not suitable for development for navigation at reasonable cost, considers the question of whether developments for navigation would be economically feasible even if all of the large number of dams and reservoirs or pools were provided free of cost to navigation improvement. He reports, with respect to the larger tributaries of the Kanawha, including of course the New River, that although they

> "are susceptible of improvement for navigation by the utilization of the pools formed by the construction of high dams for power and flood control purposes if locks or other devices are constructed for passing vessels from one pool to another" (R. 2678).

yet

> "The *large cost* of providing and operating such locks or other devices *does not appear to be justified* by any commerce immediately in prospect * * *" (R. 2678).

[1] The parenthetical reference to "steep slope and tortuous alignment" is included in Col. Spalding's statement.

In short, not even the locks or other devices, let alone the dams, could be provided at reasonable cost.

Such Report on the part of the Chief of Engineers is of course entirely in keeping with the fact that the dam of the Federal Bluestone Reservoir Project will have no locks or other means for navigation[1] and will constitute a complete barrier to navigation in the stretch of New River above Hinton, W. Va., or, as stated by the Circuit Court of Appeals,

> "will destroy any possibility of navigation from Glen Lyn to Hinton" (R. 2909).

We submit, therefore, that the evidence in the record before this Court overwhelmingly establishes the fact that New River, including the section between Radford and Wiley's Falls, cannot be made navigable at reasonable cost and that, therefore, even under the new definition enunciated by this Court, New River is not a navigable water of the United States.

## C.

The Court erred in holding that the phrase "natural and ordinary condition", as used in the definition of navigable waters adopted and applied in a long and unbroken line of decisions of this Court, merely "refers to volume of water, the gradients and the regularity of flow" (pp. 7-8).

1. No precedent is cited to support the exclusion of all natural conditions except flow and slope from the long-established definition of Federal navigable waters; and we know of no judicial support for the pronouncement. On the contrary the decisions of this Court, as well as facts of common knowledge, squarely negative the propriety of excluding from consideration all other natural conditions,

[1] The verified bill of particulars filed by the Government in the pending condemnation proceeding for the Bluestone Project states that no facilities will be provided for water transportation. Cf. R. 2899.

and especially obstacles to navigation, in determining whether a stream is navigable-in-fact.

Not merely low or irregular stream flow, but limited depths and widths of channel, high and irregular velocities, shallows, falls, rapids, tortuous channels, rocky beds, scattered boulders (exposed and concealed) and rocky ledges, are all evidence of non-navigability. Cf. Pet. Supp. Br. below, 34-35. These various types of obstacles (all excluded from consideration by the pronouncement of this Court) have been repeatedly examined by this Court on an issue of navigability. *The Montello,* 20 Wall. 430 (rocks, falls, rapids, sand bars); *Economy Light & Power Co.* v. *United States,* 256 U. S. 113 (rapids, shoals, boulders and "obstructions"; l.c. 118); *United States* v. *Holt State Bank,* 270 U. S. 49 (depths, sand bars and vegetation); *United States* v. *Utah,* 283 U. S. 64.

In *United States* v. *Utah* the obstacles to navigability, urged by the Government as precluding the existence of navigability-in-fact, included (in addition to slopes which over-all ranged only 20 per cent to 40 per cent as great as the slope in the 40-mile stretch of New River above Round Bottom, West Virginia),[1] "logs and debris, ice, floods, rapids and riffles in certain parts, rapid velocities with sudden changes in the water level, sand and sediment which combined with the tortuous course of the rivers produce a succession of shifting sand-bars, shallow depths, and instability of channel" (l.c. 84). This Court in a unanimous decision carefully reviewed the extent and combined effect of all these obstructions as shown by the facts found by the Special Master (the suit being one within the original jurisdiction of this Court). Indeed, the opinion devotes nearly two pages to consideration of the effect of sand bars alone

[1] We think no previous case can be found where this Court has held navigable a stream with an over-all gradient remotely approaching that of the 40-mile section of New River above Round Bottom, West Virginia (Resp. Appendix A, p. 124, footnote).

(l.c. 85-86)—obviously one of the least hazardous and least difficult of all natural obstacles to navigation. The Court pointed out that the sand bars, which were obviously considered as evidence making against navigability, had to be considered in connection with other natural conditions making for navigability. In short, all natural conditions, making for or against navigability, must be weighed together to determine whether under all the natural conditions navigability in fact exists under natural and ordinary conditions. Surely it can not be assumed that for one hundred years this Court, when passing upon issues of navigability, has been engaged in considering various natural conditions (other than flow and gradient) which really have nothing whatever to do with the existence of navigability-in-fact.

And apart from the decisions of this Court, it is a matter of common knowledge that the exclusion of all of these other natural conditions in determining the existence of navigability-in-fact is not in accord with the known facts of practical navigability *vel non*. Given only the "volume of water, the gradients and the regularity of the flow" (p. 8), a board composed of the greatest navigation engineers in the world could not determine whether a particular stream is navigable-in-fact in its natural and ordinary condition. Thus there is no particular volume of flow which brands a stream either as navigable or non-navigable. A given volume of water may be insufficient for navigation on one stream and yet in the case of another be either ample or so excessive as to be itself an obstruction to navigability-in-fact. The answer depends upon numerous other "natural conditions" which the present pronouncement of this Court excludes from consideration.

This is well illustrated by the Snake River, to which the Government referred in its reply brief (Pet. Reply Br. 14). Although the Snake River has a low-water discharge of 14,000 c.s.f. (many times that of many streams

which are highly navigable at all seasons) and an average slope of only three feet per mile in its lower 168-mile reach, the Chief of Engineers states that the Snake was "practically non-navigable at low water", and that its navigability was limited to the lower 140 miles at stages "which gave a navigable depth of about 6 feet * * * with a minimum channel width of about 150 feet" (Rep. of C. of E., 1924, p. 1739). This, the Chief of Engineers states, was "on account of narrow and crooked channels through rock ledges, gravel shoals and boulders". Yet obviously, if the test announced by this decision (disregarding everything but flow and slope) were in fact correct, the Snake would have been highly navigable in its natural condition even during lowest water.

It will not do, either as a matter of law or well-known fact, to say that only one or two selected natural conditions, which may make for or against navigability, shall be considered. We know that this would be impossible for a navigator in practical everyday life. It ought not to be assumed to be possible for the purposes of judicial decision.

Furthermore, promulgation of such a rule is destructive of our Constitutional system of Government. Such a rule substitutes a technical, theoretical, legalistic definition, divorced from the realities of everyday life, for the rule, established by a long and unbroken line of decisions of this Court, that a stream to be navigable in fact and hence to be navigable in law must have a real, practical and genuinely useful capacity for carrying interstate commerce of a substantial and permanent character. The result is that by an artificial legal formula, divorced from the facts determinative of practical utility, the powers of the States and the rights of their citizens in relation to vast and valuable water resources are taken over by the Federal Government without Constitutional amendment

and without compensation. As pointed out in *United States* v. *Doughton*, 62 F. (2d) 936 (C. C. A. 4):

> "Congress would thus be enabled under the commerce clause to exercise control over internal affairs of the states in relation to streams where interstate commerce has no existence, actual or potential; and the states would be deprived of vital power in regulating matters of domestic concern, having no relation to commerce. This would clearly contravene the whole theory of the Constitution as to the division of the powers of sovereignty between states and national government" (l.c. 938).

2. As we understood and now understand the petition, briefs and oral arguments in this Court, this proposition was never advanced by the Government nor intimated by the Court during oral argument; and consequently it is a proposition, at variance with all of the previous decisions, upon which neither the Respondent nor the States appearing herein as *amici curiae* have been heard.

## D.

The Court erred in holding that a different test of navigability was applicable in cases involving riparian rights or title to beds of streams than in cases involving the extent of Federal power under the commerce clause.

1. The cases relied upon by the Court as involving title to beds or riparian rights (except *Shively* v. *Bowlby*, 152 U. S. 1, which did not consider any question of navigability) were based upon the definition of navigability as set forth in the decisions of this Court in *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430; *United States* v. *Rio Grande D. & I. Co.*, 174 U. S. 690; *Economy Light & Power Co.* v. *United States*, 256 U. S. 113; *Leovy* v. *United States*, 177 U. S. 621; *United States* v. *Cress*, 243 U. S. 316, all of which cases construed the power of the Federal Government over navigable streams under the commerce clause.

2. The definition of navigability, from which this Court in this case has departed, is applicable to all cases involving "the Constitution and laws of the United States" (*United States* v. *Holt State Bank*, 279 U. S. 49, 56) regardless of whether the controversy relates to Federal power under the commerce clause or to riparian rights.

3. The Government did not contend in the court below, or in this Court, that a different rule was applicable in cases involving the extent of Federal power under the commerce clause.

4. Neither Respondent nor the States have ever been heard on the question.

## E.

The Court erred in holding inapplicable, to a finding that a stream is not navigable in fact in interstate commerce, the long established rule that factual findings concurred in by two lower courts will be accepted in this Court unless clear error is shown.[1]

1. Under our Constitutional system it is, and always has been, the law that Federal navigability is a question of fact. *Arizona* v. *California*, 283 U. S. 423, 452; *Crowell* v. *Benson*, 285 U. S. 22, 55; *Oklahoma* v. *Texas*, 258 U. S. 574, 586, 590-1; *United States* v. *Utah*, 283 U. S. 64, 87. With the exception of the decision announced in this case, it has been, and apparently continues to be, the settled rule of this Court that concurrent findings of fact will be accepted as unassailable in this Court if supported by substantial evidence. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477; *United States* v. *O'Donnell*, 303 U. S. 501; *United States* v. *Commercial Credit Co.*, 286 U. S. 63; *United States* v. *Chemical Foundation*, 272 U. S. 1. This Court has ex-

[1] While Respondent properly relied upon this long established rule, Respondent also insisted, and now insists, that the concurrent finding of the lower courts is supported by the overwhelming weight of the evidence.

pressly applied the rule to the issue of navigability. *Brewer-Elliott Oil Co.* v. *United States,* 260 U. S. 77, 86. None of the cases cited in the Court's opinion supports the abrogation of this rule on an issue of navigability-in-fact.

Under this rule, the only questions open to the Government in this Court are (a) whether the lower courts applied the correct criteria of law, and (b) whether the concurrent finding is supported by substantial evidence. Questions of the weight, credibility, relevance and inferences of fact to be drawn from conflicting items of evidence by the trier of fact are not open here. In each of the cases cited in the opinion, it will be found that this Court did nothing more than either examine the correctness of the criteria of law applied by the lower courts or examine the record only in so far as was necessary to determine whether a concurrent finding was supported by substantial evidence.

Indeed, in *Leovy* v. *United States,* 177 U. S. 621 (cited in the opinion, p. 5), this Court merely passed upon the correctness of instructions given to a jury to which had been submitted an issue of navigability. Obviously, where this Court finds that a jury has been erroneously instructed or that the lower courts have applied erroneous criteria of law, the resulting finding can not be accepted as determinative and this Court will, in accordance with the usual practice, determine whether the case may be disposed of without remand for a new trial or hearing. *Cf.* also *United States* v. *Holt State Bank, supra.* But that circumstance furnishes no support for the abrogation of the two-court rule in any kind of a case.

The abrogation of this rule is not only in the teeth of prior decisions of this Court but carries with it hazards of a dangerous nature. We are not dealing with a mere "conventional rule" (p. 5) or a rule of convenience, to be applied as a matter of discretion or as a labor-saving device, but with a rule which rests upon substantial grounds essen-

tial to a fair administration of justice. The rule recognizes the compelling fact that the trial court, before argument or submission of briefs, hears all of the evidence and testimony as it is unfolded on the record, sees and hears the witnesses and is in a position properly to appraise the credibility and weight of testimony. The very process of trial in open court is such that the court is afforded time to digest, understand and sift the evidence which is of particular importance in cases with voluminous records. Thus in the instant case, the trial court heard testimony continuously from July 13, 1936, through September 5, 1936, later heard oral argument for three days and painstakingly examined and studied not only the record but printed briefs totaling 1257 pages in which the evidence was carefully sifted and reviewed from every viewpoint.

No such opportunity for weighing and sifting the evidence is available in this Court. Yet the decision in this cause not only sets aside the concurrent finding but also gives no weight whatsoever to the finding of either lower court. Under such circumstances, it would be idle for lower courts painstakingly, laboriously and carefully to discharge what they have conceived to be their judicial duty in weighing and sifting the evidence to the end that the material facts might be found not only for decision of the cause by those courts, but as the basis of review in this Court. If the rule now announced is to stand, it would seem that Rule 52 of The Federal Rules of Civil Procedure only recently promulgated by this Court should be drastically limited or entirely eliminated. Rule 52 provides that even the finding of a trial court (lacking the reinforcement of a painstaking review by a Court of Appeals) "shall not be set aside unless clearly erroneous."

The dangers in the innovation adopted in the instant case are, we think, graphically illustrated (a) by the erroneous statement that the only disagreement is over the con-

clusions "to be drawn from this *uncontroverted evidence*" (p. 5) and (b) by the fact that much of the evidence or testimony cited in the opinion as "uncontroverted" is evidence or testimony which we believe, and certainly the lower courts may well have believed, was not credible or in any event was testimony given by witnesses entitled to neither credibility nor weight and contradicted by evidence and testimony entitled to much more weight, but to which the opinion does not refer. The overlooking of material evidence, the reliance upon evidence unduly stressed or placed out of relation to the evidence with which it must be weighed, is the natural and inescapable consequence of any attempt by this Court to undertake to determine such issues of fact *de novo*.

2. Nor, we submit, can the abrogation of the two-court rule be justified by the statement that on the issue of navigability "facts and their *constitutional significance* are too closely connected to make the two-court rule a serviceable guide" (p. 5). The circumstance that the determination of facts one way or another may lead to different conclusions, as to the existence or non-existence of Constitutional rights or authority, is only an added reason why they should be determined in the manner in which long judicial experience has shown will best serve the ends of justice. Whether the fact be determinative of a Constitutional right or merely determinative of tort liability, the only objective in any system of justice is that the fact be honestly and rightly found.

Except in this case, no one has ever suggested, nor does anyone now suggest, that the findings of the lower courts (including the better opportunity of the trial court in particular to weigh and appraise the testimony) are to be disregarded merely because the facts so conscientiously determined may, upon application of the law, prove to be turning points of Constitutional decision.

3. Nor, we submit, can the abrogation of the two-court rule be based upon the proposition that "The legal con-

cept of navigability embraces both public and private interests." (p. 5) It would be difficult to imagine any issue of fact in a suit involving the rights of a citizen *vis-à-vis* his Government which does not involve public and private interests in the sense that determination of the facts may well determine the respective rights of the citizen and his Government, regulatory and governmental or other. The Court cites no precedent, and we think none can be found, in which any such principle has been announced or applied. But there is no more reason for changing the rules with respect to an issue of navigability-in-fact because it may affect the outcome of the suit than there is for changing the rule long applicable, and not now set aside, to the determination of every other fact in every Constitutional case which comes before this Court. Indeed, there is in our judgment less justification for this change in rule as applied to navigability-in-fact than in relation to almost any other issue of Constitutional fact which comes before this Court. Invariably every stream is *sui generis* as to its physical characteristics, its use or non-use and the other relevant circumstances bearing upon its navigability *vel non*. Invariably such cases involve a mass of evidence which must be carefully sifted and appraised in order to arrive at the fact. Laying aside the lack of opportunity for this Court to judge the weight and credibility of testimony of witnesses, such issues can not be adequately presented within the compass of briefs or arguments permissible under the established practice, which has prevailed in this Court since its earlier days.

4. Nor, we submit, can this change in rules be sustained upon the ground that "Both the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied" (pp. 5-6). Every determination of fact either by a court or a jury is, of course, an appraisal of the weight to be given, and the in-

ferences to be drawn from, the testimony and evidence by the trier of fact (whether it be court or jury) in the light of some legal definition. It matters not whether the issue be negligence, fraud or navigability. Naturally, in finding the facts in any case, the applicable legal criteria are inseparable from the particular facts of that case in the sense that the inferences to be drawn from the evidence in the light of the applicable instruction to the jury or the legal definition by the court are, or at least may be, *sui generis*. But in this aspect no peculiar situation exists, in finding whether a stream is navigable-in-fact in interstate commerce, which does not exist on every issue of fact.

In short, every reason given by the opinion for departing from the established two-court rule applies as well to every Constitutional case that ever has been, or ever will be, submitted to this Court. The departure not only affects the rights of the parties hereto but will return to plague this Court in every term until it shall be overruled.

## II.

### License Conditions.

The Court erred in holding that in relation to projects on a navigable stream the challenged license conditions are within the Constitutional authority of the United States.

### A.

The Court erred in holding that "The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power" (p. 22).

The Government concedes (Pet. Rep. Br. 38), and as we read the opinion the Court holds, that the challenged conditions are not "even concerned with navigation as such" (p. 20). Any Constitutional basis must, therefore, be found in some exercise of the commerce power not concerned with, or dependent upon, the fact that the subject-matter regulated is navigable waters. Apart from their

use as highways of interstate commerce, navigable waters are subject to no greater or different authority under the commerce clause than fast land and are no more subject to "national planning" (p. 22) than any other natural resources of the States.

The statement that Federal Constitutional authority over navigable waters *as such* is not limited to control thereof for purposes of navigation is unsupported by any citation of authority and is, we submit, denied by every previous decision of this Court which has examined the nature and scope of Federal Constitutional authority in relation to such waters (See cases cited, Resp. Br. 109). The concession, that the regulations are not concerned with control of navigable waters for purposes of navigation, renders the location of the project sought to be regulated irrelevant to a determination of whether the challenged conditions are within the commerce power and the only issue remaining is whether they fall within the scope of the commerce power regardless of where the project thus regulated may be situated.

2. The commerce power does not extend to anything and everything merely because an attempted regulation is described as "national planning." Since the challenged conditions are unrelated to navigation or to the preservation and use of navigable waters as highways of interstate commerce, what is their relation to the commerce power?

Respondent's project is a power project. It is neither built nor susceptible of use for any other purpose. To the extent that flood protection is within any Constitutional authority of the Federal Government, it is not involved in this case (Pet. Br. 102, n28; Resp. Br. 86-7, 118-9). The commerce clause, apart from such power as may be exercised over navigable waters as highways of interstate commerce or apart from the authority to construct an artificial navigable waterway provided compensation be made for

property taken (neither of which is involved in this case), no more grants authority to engage in "watershed development" (p. 22) than it grants authority to develop and exploit the mines, timberlands, or agricultural resources of the States.

If the commerce power be construed to embrace such subjects, then, contrary to that fundamental principle of our Constitutional system, which has been unchallenged since its foundation, the Federal Government will, without Constitutional amendment, have been converted into a completely centralized Government.

3. No relation to the commerce clause may be founded upon a claimed right to recover "cost of improvements through utilization of power" (p. 22). The Government is not here making any improvement or recovering the cost of any improvement.

The Government has no more authority to develop water power for the purpose of paying the cost of a particular Federal improvement than it has to develop water power in order to augment the general fund of the Government or to embark on any other business for the purpose of making money. This Court said in *Ashwander* v. *T. V. A.*, 297 U. S. 288, 340:

> " • • • And the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such (electrical) energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States."

The plain and unequivocal meaning is that the development of water power for profit or otherwise is not *per se* "a power delegated to the United States"

**B.**

The Court erred in holding that, even if the license conditions are unrelated to the commerce power, the plenary

power of Congress over navigable waters vests authority in Congress to impose such unrelated conditions.

1. Under the commerce power, as under any other Constitutional power, the Government may not impose regulations in excess of its Constitutional authority. The principle here declared by the Court sanctions for the first time the exercise of authority not granted but forbidden to the Federal Government (See cases cited, Resp. Br. 128).

2. To say that "Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment" (p. 22) manifestly furnishes no basis for sustaining regulations postulated to be without relation to, and therefore outside the scope of, the commerce power. For illustration, Congress may not forbid citizens to engage in interstate commerce, unless they will turn their property over to the Federal Government or unless they will otherwise submit to unauthorized Federal regulation. While it is no objection if an exercise of commerce power happens to be "attended by the same incidents which attend the exercise of the police power of the states" (p. 22), it does not follow that the Federal Government may therefore exercise any authority, even though not granted, so long as it partakes of the nature of police power.

## C.

The Court erred in holding that the capture clause is Constitutional.

1. The Court erred in holding not only that the capture clause is not confiscatory but also that the Government could capture Respondent's project at all, for whatever compensation—this for the reason that it is plainly beyond the Constitutional authority of the Government to acquire such a project. Respondent's project is a power project and is neither built nor susceptible of use for any other purpose. Moreover, there should be no confusion as to the

purpose of "taking over" by the Government under Section 14 of the Act. The contract right thus sought to be acquired is to "take over and thereafter to maintain and operate any project or projects as defined in Section 3" of the Act. Thus, by the very terms of the Act the statutory contract is to take over, maintain and operate a power project adapted to, or suitable for, no other purpose. Moreover, under Section 15 of the Power Act, the Government would also have the right to turn Respondent's project over to some other power company for operation. To test whether any Constitutional authority so to take over and maintain Respondent's power project exists, it is only necessary to consider what would be the situation if the Government were to file a suit to condemn Respondent's property for the declared purpose of engaging in the power business. Plainly such a declaration in condemnation would be dismissed on demurrer or motion as an attempt to condemn property for a purpose in excess of any Constitutional authority of the United States.

The statement that "Since the United States might [has power to] erect *a* structure in these waters itself, even one equipped for electrical generation, it may constitutionally acquire one already built" (p. 23) is either inapposite or a complete *non sequitur*. The Government would have power to build a postoffice on a city lot, but it would not follow that it could therefore condemn or otherwise acquire a department store, bakery or other mercantile establishment located on that lot for the purpose of maintaining and operating the mercantile business theretofore established.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the decree

of the Circuit Court of Appeals for the Fourth Circuit be, upon further consideration, affirmed.

Respectfully submitted,

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January 10, 1941.

We hereby certify that the foregoing petition is presented in good faith and not for delay.

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# SUPREME COURT OF THE UNITED STATES.

No. 12.—October Term, 1940.

The United States of America, Petitioner, vs. Appalachian Electric Power Company. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 16, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

This case involves the scope of the federal commerce power in relation to conditions in licenses, required by the Federal Power Commission, for the construction of hydroelectric dams in navigable rivers of the United States. To reach this issue requires, preliminarily, a decision as to the navigability of the New River, a water-course flowing through Virginia and West Virginia. The district court and the circuit court of appeals have both held that the New River is not navigable, and that the United States cannot enjoin the respondent from constructing and putting into operation a hydroelectric dam situated in the river just above Radford, Virginia.

Sections 9 and 10 of the Rivers and Harbors Act of 1899 make it unlawful to construct a dam in any navigable water of the United States without the consent of Congress.[1] By the Federal Water Power Act of 1920,[2] however, Congress created a Federal Power Commission with authority to license the construction of such dams upon specified conditions. Section 23 of that Act provided that persons intending to construct a dam in a nonnavigable stream may file a declaration of intention with the Commission. If after investigation the Commission finds that the interests of interstate or foreign commerce will not be affected, permission shall be granted

1 30 Stat. 1151, 33 U. S. C. §§ 401, 403.

2 41 Stat. 1063. The Act was amended by 49 Stat. 838 (1935), U. S. C. Supp. V, Title 16, § 791 *et seq.*, by which it became known as the Federal Power Act.

for the construction. Otherwise construction cannot go forward without a license.

The Radford Dam project was initiated by respondent's predecessor, the New River Development Company, which filed its declaration of intention with the Federal Power Commission on June 25, 1925. The Commission requested a report from General Harry Taylor, then Chief of Engineers of the War Department. He first reported that the river was navigable, and also that while the water flow from the dam, if not properly regulated, could have an adverse effect on navigation during low water stages in the Kanawha River (of which the New was one of the principal tributaries), such possible adverse effect would not warrant refusing a license to construct the dam if control was maintained by the United States. On review at the Commission's request, however, General Taylor rendered a second report, concluding that the New River in its present condition was not navigable and that navigation on the Kanawha would not be adversely affected by the proposed power development. On March 2, 1926, the Commission held a hearing on the declaration; the only evidence then submitted was General Taylor's second report.

Respondent, the Appalachian Electric Power Company, took an assignment of the declaration of intention on August 30, 1926, and several days later filed an application for a license on the Commission's suggestion that this would expedite matters and could be withdrawn if it later developed that no federal license was required. In October, the district engineer of the War Department held a public hearing at Radford. On June 1, 1927, the Commission made a finding that the New River was not "navigable waters" within the definition in section 3(8) of the Federal Water Power Act of 1920 but that (under section 23 of the Act) the project would affect the interests of interstate and foreign commerce. On July 1, 1927, the Commission tendered to respondent a standard form license which the respondent refused in April, 1928, principally on the ground that the conditions—especially those concerning rates, accounts and eventual acquisition—were unrelated to navigation. In February, 1930, respondent reiterated that its project was not within the Commission's jurisdiction, but nevertheless offered to accept a "minor-part" license[3] containing only such conditions as would protect the interests of the United States in navigation. In

[3] Section 10(i).

September, 1930, Attorney General Mitchell advised the Commission that it could properly issue such a minor-part license;[4] the question submitted by the Commission had stated that the New River was neither navigated nor navigable in fact. On November 25, the Commission "declined to take action on the application favorable or adverse," on the ground that a court adjudication was desirable. After the establishment of the Commission as an independent agency;[5] it held another hearing in February, 1931; in April it denied the application for a minor-part license, directed that the respondent be tendered a standard form license under the Act, and ordered it not to proceed without such a license. A minority of the Commission then favored a finding that the New River was navigable; the majority, however, thought that question was for the courts and that the Commission's jurisdiction was properly based upon section 23 of the Federal Water Power Act.

On June 8, 1931, the respondent brought an action against the Commission to remove a cloud on its title and to restrain interference with the use of its property. This case was dismissed for jurisdictional reasons.[6] While it was pending, on October 12, 1932, the Commission, without notice adopted a resolution that the New River, from the mouth of Wilson Creek, Virginia, north, was navigable.

The respondent began construction work on the dam about June 1, 1934. On May 6, 1935, the United States filed this bill for an injunction against the construction or maintenance of the proposed dam otherwise than under a license from the Federal Power Commission, and in the alternative a mandatory order of removal. It alleged that the New River is navigable; that the dam would constitute an obstruction to navigation and would impair the navigable capacity of the navigable waters of the United States on the New, Kanawha and Ohio Rivers; that the Commission had found the dam would affect the interests of interstate or foreign commerce; and that its construction therefore violated both the Rivers and Harbors Act and the Federal Water Power Act. Respondent denied these allegations, and also set forth a number of separate defenses based on the assumption that the New River was nonnavigable. The

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[4] 36 Op. A. G. 355.

[5] Originally it consisted of three cabinet officers, ex officio: the Secretaries of War, Interior, and Agriculture. By 46 Stat. 797 it was reorganized into an independent Commission with five members. The new Commission began to function on December 22, 1930.

[6] Appalachian Electric Power Co. *v.* Smith, 67 F. (2d) 451, cert. denied, 291 U. S. 674.

fortieth and forty-first paragraphs of the answer, however, set forth defenses relied on by the respondent even if the river were held navigable. The substance of these was (1) that the conditions of any federal license must be strictly limited to the protection of the navigable capacity of the waters of the United States; and (2) that the Commission's refusal to grant the minor-part license containing only such conditions was unlawful, and that any relief should be conditioned upon the Commission's granting respondent such a license. By these defenses respondent put in question—in the event of an adverse holding on navigability—the validity of the conditions of the Act carried over into the standard form license which relate to accounts, control of operation and eventual acquisition of the project at the expiration of the license.

After trial, in an opinion reinforced by formal findings of fact and law, the district court decided that the New River is not a navigable water of the United States; that respondent's dam would not obstruct the navigable capacity of the Kanawha or any other navigable river, and would not affect the interests of interstate commerce; that the Power Commission's findings on these matters were not final but subject to the determination of the courts;[7] that the Federal Water Power Act did not vest in the Commission authority to require a license in a nonnavigable river; that even if the Commission had authority to require some license for a dam in nonnavigable waters, it could not impose conditions having no relation to the protection of the navigable capacity of waters of the United States; and that its effort to impose upon respondent a license containing unlawful conditions barred the United States from relief. The district judge therefore dismissed the bill, but left it open to the Government to assert its rights if future operation of the project interfered with the navigable capacity of the waters of the United States. The circuit court of appeals, with one judge dissenting, affirmed. We granted certiorari.[8]

*Concurrent Findings.* The district court's finding that the New River was not navigable was concurred in by the circuit court of appeals after a careful appraisal of the evidence in the record.[9]

[7] In both courts below the Government unsuccessfully urged that the findings of the Commission, if supported by substantial evidence, were conclusive. Although it still regards this contention as correct, the Government does not seek to have this Court pass on it in this case.

[8] 309 U. S. 646.

[9] 107 F. (2d) 769, 780, 787.

Both courts stated in detail the circumstantial facts relating to the use of the river and its physical characteristics, such as volume of water, swiftness and obstructions. There is no real disagreement between the parties here concerning these physical and historical evidentiary facts. But there are sharp divergencies of view as to their reliability as indicia of navigability and the weight which should be attributed to them. The disagreement is over the ultimate conclusion upon navigability to be drawn from this uncontroverted evidence.

The respondent relies upon this Court's statement that "each determination as to navigability must stand on its own facts,"[10] and upon the conventional rule that factual findings concurred in by two courts will be accepted by this Court unless clear error is shown.[11]

In cases involving the navigability of water courses, this Court, without expressly passing on the finality of the findings, on some occasions has entered into consideration of the facts found by two courts to determine for itself whether the courts have correctly applied to the facts found the proper legal tests.[12] When we deal with issues such as these before us, facts and their constitutional significance are too closely connected to make the two-court rule a serviceable guide. The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all times. Our past decisions have taken due account of the changes and complexities in the circumstances of a river. We do not purport now to lay down any single definitive test. We draw from the prior decisions in this field and apply them, with due regard to the dynamic nature of the problem, to the particular circumstances presented by the New River. To these circumstances certain judicial standards are to be applied for determining whether the complex of the conditions in respect to its capacity for use in interstate commerce render it a navigable stream within the Constitutional requirements. Both the standards and the ultimate conclusion involve

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[10] United States *v.* Utah, 283 U. S. 64, 87.

[11] Brewer Oil Co. *v.* United States, 260 U. S. 77, 86; e. g., Alabama Power Co. *v.* Ickes, 302 U. S. 464, 477; Pick Mfg. Co. *v.* General Motors Corp., 299 U. S. 3; Texas & N. O. R. Co. *v.* Ry. Clerks, 281 U. S. 548, 558; United States *v.* O'Donnell, 303 U. S. 501, 508.

[12] United States *v.* Rio Grande Irrigation Co., 174 U. S. 690, 699; Leovy *v.* United States, 177 U. S. 621; Economy Light Co. *v.* United States, 256 U. S. 113, 117; United States *v.* Holt Bank, 270 U. S. 49, 55.

questions of law inseparable from the particular facts to which they are applied.

*Navigability.* The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. "The Congress shall have Power . . . To regulate Commerce . . . among the several States." It was held early in our history that the power to regulate commerce necessarily included power over navigation.[13] To make its control effective the Congress may keep the "navigable waters of the United States" open and free and provide by sanctions against any interference with the country's water assets.[14] It may legislate to forbid or license dams in the waters;[15] its power over improvements for navigation in rivers is "absolute."[16]

The states possess control of the waters within their borders, "subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers."[17] It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters.

The navigability of the New River is, of course, a factual question[18] but to call it a fact cannot obscure the diverse elements that enter into the application of the legal tests as to navigability. We are dealing here with the sovereign powers of the Union, the Nation's right that its waterways be utilized for the interests of the commerce of the whole country. It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs;[19] that the density of traffic varies equally widely from

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[13] Gibbons *v.* Ogden, 9 Wheat. 1, 189; Leovy *v.* United States, 177 U. S. 621, 632.

[14] Gilman *v.* Philadelphia, 3 Wall. 713, 724-25; United States *v.* Coombs, 12 Pet. 72, 78.

[15] Willson *v.* The Black Bird Creek Marsh Co., 2 Pet. 245, 250; United States *v.* Rio Grande Irrigation Co., 174 U. S. 690, 703.

[16] United States *v.* River Rouge Co., 269 U. S. 411, 419.

[17] Water Power Co. *v.* Water Commissioners, 168 U. S. 349, 366; United States *v.* Rio Grande Irrigation Co., 174 U. S. 690, 702.

[18] Arizona *v.* California, 283 U. S. 423, 452.

[19] The Montello, 20 Wall. 430, 441.

the busy harbors of the seacoast to the sparsely settled regions of the Western mountains.[20] The tests as to navigability must take these variations into consideration.

Both lower courts based their investigation primarily upon the generally accepted definition of *The Daniel Ball*.[21] In so doing they were in accord with the rulings of this Court on the basic concept of navigability.[22] Each application of this test, however, is apt to uncover variations and refinements which require further elaboration.

In the lower courts and here, the Government urges that the phrase "susceptible of being used, in their ordinary condition," in the *Daniel Ball* definition, should not be construed as eliminating the possibility of determining navigability in the light of the effect of reasonable improvements. The district court thought the argument inapplicable.[23]

The circuit court of appeals said:

"If this stretch of the river was not navigable in fact in its unimproved condition, it is not to be considered navigable merely because it might have been made navigable by improvements which were not in fact made. Of course if the improvements had been made the question of fact might have been different."[24]

To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. "Natural and ordinary condi-

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20 United States *v.* Utah, 283 U. S. 64, 83.

21 10 Wall. 557, 563:

". . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

United States *v.* Appalachian Electric Power Co., 23 F. Supp. 83, 98; same, 107 F. (2d) 769, 780.

22 United States *v.* Rio Grande Irrigation Co., 174 U. S. 690, 698; Brewer Oil Co. *v.* United States, 260 U. S. 77, 86; United States *v.* Holt Bank, 270 U. S. 49, 56; United States *v.* Utah, 283 U. S. 64, 76; United States *v.* Oregon, 295 U. S. 1, 15.

23 23 F. Supp. at 99-100.

24 107 F. (2d) at 786.

tion"[25] refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in section 3(8) of the Water Power Act by defining "navigable waters" as those "which either in their natural or improved condition" are used or suitable for use. The district court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree.[26] There must be a balance between cost and need at a time when the improvement would be useful. When once found to be navigable, a waterway remains so.[27] This is no more indefinite than a rule of navigability in fact as adopted below based upon "useful interstate commerce" or "general and common usefulness for purposes of trade and commerce" if these are interpreted as barring improvements.[28] Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic.

Of course there are difficulties in applying these views. Improvements that may be entirely reasonable in a thickly populated, highly developed, industrial region may have been entirely too costly for the same region in the days of the pioneers. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement. Although navigability to fix ownership of the river bed[29] or riparian rights[30] is deter-

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[25] United States *v.* Oregon, 295 U. S. 1, 15.

[26] Thus in the Rio Grande case, the record contained reports of army engineers that improvements necessary to make the river navigable would be financially, if not physically, impracticable because of the many millions of dollars that would be required. The supreme court of the Territory of New Mexico observed that "the navigability of a river does not depend upon its susceptibility of being so improved by high engineering skill and the expenditure of vast sums of money, but upon its natural present conditions" (9 N. M. 292, 299). This Court agreed that too much improvement was necessary for the New Mexico stretch of the river to be considered navigable. United States *v.* Rio Grande Irrigation Co., 174 U. S. 690, 699.

[27] Economy Light Co. *v.* United States, 256 U. S. 113.

[28] See 107 F. (2d) at 780.

[29] Shively *v.* Bowlby, 152 U. S. 1, 18 and 26; United States *v.* Utah, 283 U. S. 64, 75.

[30] Oklahoma *v.* Texas, 258 U. S. 574, 591, 594; United States *v.* Oregon, 295 U. S. 1, 14.

mined as the cases just cited in the notes show, as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise.[31] An analogy is found in admiralty jurisdiction,[32] which may be extended over places formerly non-navigable.[33] There has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents.[34] The plenary federal power over commerce must be able to develop with the needs of that commerce which is the reason for its existence. It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce.[35] In determining the navigable character of the New River it is proper to consider the feasibility of interstate use after reasonable improvements which might be made.[36]

Nor is it necessary for navigability that the use should be continuous. The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use.[37] Small traffic compared to the available commerce of the region is sufficient.[38] Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense.[39] It is well recognized too that

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31 Cf. United States *v.* Rio Grande Irrigation Co., 174 U. S. 690, 699.

32 Art. III, section 2, cl. 1. Cf. Genessee Chief *v.* Fitzhugh, 12 How. 443.

33 The Robert W. Parsons, 191 U. S. 17, 28; Ex parte Boyer, 109 U. S. 629; Marine Transit Co. *v.* Dreyfus, 284 U. S. 263, 271-72.

34 The Montello, 20 Wall. 430, 442-43; Economy Light Co. *v.* United States, 256 U. S. 113, 122; United States *v.* Utah, 283 U. S. 64, 86. See also Mr. Justice McLean in Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, at p. 944 (C. C. D. Ohio 1838).

35 Illustrative of this natural growth is United States *v.* Cress, 243 U. S. 316, involving riparian proprietors' rights where improvements raise the river level so that uplands are newly and permanently subjected to the servitude of public use for navigation. Compensation was decreed for the taking with a declaration that the waterways in question, as artificially improved, remained navigable waters of the United States (pp. 325 and 326). Cf. Arizona *v.* California, 283 U. S. 423, 454.

36 Cf. Barnes *v.* United States, 46 Ct. Cl. 7, 28.

37 United States *v.* Utah, 283 U. S. 64; Arizona *v.* California, 283 U. S. 423, 452-54.

38 United States *v.* Utah, 283 U. S. 64, 82.

39 Ashwander *v.* Tennessee Valley Authority, 297 U. S. 288, 329.

the navigability may be of a substantial part only of the waterway in question.[40] Of course, these evidences of nonnavigability in whole or in part are to be appraised in totality to determine the effect of all. With these legal tests in mind we proceed to examine the facts to see whether the 111-mile reach of this river from Allisonia to Hinton, across the Virginia-West Virginia state line, has "capability of use by the public for the purposes of transportation and commerce."[41]

*Physical Characteristics.* New River may be said to assume its character as such at the mouth of Wilson Creek near the North Carolina-Virginia line. From that point it flows first in a northeast and then in a northwest direction something over 250 miles to Kanawha Falls, West Virginia. It passes through Allisonia and Radford, Virginia, and then Hinton, West Virginia. It is joined by many tributaries, the largest of which is the Gauley. At Kanawha Falls it changes its name to the Kanawha, a navigable river of commercial importance which joins the Ohio 97 miles below. The whole territory traversed by the New is broken and mountainous. Between Hinton and Kanawha Falls, the river is swift and the gorge precipitous. Above Hinton the river flows more slowly, through a broader valley and between less rugged mountains. The same may be said of the area above Radford. Throughout the river there is an abundance of water, and the respondent hardly denies that the flowage suffices if other conditions make the New available for navigation.[42]

It will conserve discussion to appraise the navigability of the 111-mile stretch between Allisonia and Hinton in three sections which together form the whole reach between these points: the 28 miles from Allisonia to Radford, which the United States improved between 1876 and 1883; the 59-mile stretch from Radford to Wiley's Falls, Virginia, never improved except at Wiley's Falls itself; and the 24 miles from Wiley's Falls across the state line to Hinton, West Virginia, which, like the upper section, the Government improved during 1876-1883. We shall examine chiefly the disputed middle section, for as to the others the evidence of navigability is much stronger and that of obstructions much weaker. For instance, the report of

[40] Economy Light Co. *v.* United States, 256 U. S. 113, 124; Arizona *v.* California, 283 U. S. 423, 453.

[41] Cf. The Montello, 20 Wall. 430, 441.

[42] See 23 F. Supp. at 91.

the Chief of Engineers for 1873 refers to certain keelboats operating on the river, and his report for 1883 shows that 17 keelboats operated above Hinton. Keelboats were flat-bottomed bateaux, 50 to 70 feet long, with a draft of two feet and a carrying capacity varying up to 10 or 12 tons. They were used commercially to transport lumber, tobacco and other products of the region. The evidence is clear that these bateaux plied from Hinton up to near Glen Lyn with fair regularity through the first decade of this century and well into the second; timber and lumber in large quantities apparently were boated and rafted down to Hinton from various up-river points below Glen Lyn until about the beginning of the World War.[43] Around and above Radford the Chief of Engineers reported two keelboats operating in 1881, eight in 1882, and eight together with a small steamboat in 1883. The corroborating testimony of many witnesses shows that in the 80s these boats carried iron ore and pig iron, as well as produce and merchandise, between Allisonia and New River Bridge, which is a little above Radford.[44] At the Hinton and New River Bridge railroad stations, freight brought in by the keelboats or other river craft was transshipped, and freight arriving by rail was forwarded by river.

We come then to a consideration of the crucial stretch from Radford to below Wiley's Falls where junction is made with the interstate reach from Wiley's Falls to Hinton. In the report of the Secretary of War for 1872 appears Hutton's useful mile-by-mile survey of the river from above Allisonia to the mouth of the Greenbrier, which is nearly down to Hinton. It was made as a basis for plans to improve the New by federal appropriation.[45] This survey designates the Radford-Wiley's Falls stretch as "mile 46" to "mile 104" inclusive. Eighteen of these miles have grades falling, gradually or abruptly, more than four feet in the mile. Several of these where there are rapids or falls show drops of eight, nine and in one instance 11½ feet. The higher footage represents, of course, miles

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43 This is shown by the testimony of Weiss, Peters, Starbuck, Lane, E. M. Smith, Farley, Kenley, Lucas, E. W. Lilly, W. L. Burks, Z. V. Burks, Johnson, Wauhop, Stover, R. Calloway, J. C. Martin, Tomkies, and B. C. Lilly.

44 E. g., the testimony of R. L. Howard, Graham, J. Breeding, Owen, Z. Farmer, H. B. Allison, J. H. Howard, Peterson, Moore, Likens, Roop, and Ingles.

In 1885 the assistant engineer reported that "from inquiries it is thought that the channel-way made in former years [on the improved sections] still keeps open, and bateaux are in constant use on them, iron having been shipped to New River bridge up to the time of the suspension of the furnaces by the prevailing hard times" (Report of the Chief of Engineers for 1886).

45 17 Stat. 376.

in which small falls are found. Between these more precipitous sections are many miles of what is called "good water," with a gradual fall of 4 feet or less. Even in miles where the declivity is rapid, the fall is apparently largely in sections containing obstructions. For instance, the 51st mile reads "Rapid, over bowlders and gravel, 1,500 feet long; fall, 8½ feet," and the 100th mile "Neilley's Falls and rapids; whole fall, 11 feet, 6 of it nearly vertical. A sluice 500 feet long, along left bank, will pass them, with 50 feet of rock excavation and 450 feet of bowlders and gravel." Quite frequently where the fall is moderate, other obstructions appear, as the 78th mile "Rapids, 500 feet long, over bowlders and gravel; fall, 2 feet." Large isolated rocks are scattered abundantly throughout the stretch. A geologist testifying for the respondent tells strikingly how the faulting and folding of the surface at this stretch has resulted in the tilting of the rock strata to a steep degree. "In its flow, the water of New River moves along and up the slopes of successive rock strata or ledges . . . . this results in a river with numerous ledges of rock strata, some partly submerged, some exposed, which are substantially vertical or standing on end, and which extend across the stream at right angles to the line of flow . . . . The slope of the strata is downward in an upstream direction rather than in a downstream direction," contrary to the usual condition. No other data point to material variations from these descriptions.

*Use of the River from Radford to Wiley's Falls.* Navigation on the Radford-Wiley's Falls stretch was not large. Undoubtedly the difficulties restricted it and with the coming of the Norfolk & Western and the Chesapeake & Ohio railroads in the 80s, such use as there had been practically ceased, except for small public ferries going from one bank to the other.[46] Well authenticated instances of boating along this stretch, however, exist. In 1819 a survey was made by Moore and Briggs, whom the General Assembly of Virginia had sent to report on the availability of the New for improvement. Beginning at the mouth of the Greenbrier they boated up to the mouth of Sinking Creek, some 55 miles, noting the characteristics of the river as they went. They reported that they ascended all falls with their boat, "though, in two or three instances, with considerable difficulty, after taking out our baggage, stores,

[46] At different times before 1935 ferries crossed the river at no less than ten points along the Radford-Wiley's Falls stretch. In 1935 there were five such public ferries.

&c."[47] Sinking Creek is about half way up this stretch of river we are considering.

In 1861 the Virginia General Assembly appropriated $30,000 to improve the New River to accomodate transportation of military stores by bateaux from Central depot [Radford] to the mouth of the Greenbrier.[48] While there is no direct proof that this particular appropriation was spent, reports of the War Department engineers make it clear that the Confederate government effected some improvements on the river.[49] These facts buttress the testimony of several witnesses, one a Confederate veteran, that during the Civil War keelbottom boats brought supplies from Radford to a commissary at the Narrows (about 7 miles above Glen Lyn), and then continued further downstream.[50] This testimony the circuit court of appeals accepted as true.[51]

From the end of the Civil War to the coming of the railroads, the evidence of elderly residents familiar with events along the banks of the river between Radford and Wiley's Falls leaves no doubt that at least sporadic transportation took place in and throughout this stretch. By this it is not meant that the keelboats above Radford and above Hinton, which operated frequently in the improved sections, made regular through trips from Allisonia past Radford to Hinton. Through navigation, however, did occur, as is shown by the testimony of a number of witnesses and recognized by the lower courts.[52] There are also numerous references to isolated bits of

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47 Report of Moore and Briggs. Fourth and Fifth Annual Reports of the Board of Public Works to the General Assembly of Virginia (1819). Report of the Principal Engineer of the Board of Public Works.

While Marshall was Chief Justice he was head of a Virginia commission which had surveyed part of the New River by boat in 1812, but only going downstream from the mouth of the Greenbrier. Report of the Commissioners, printed 1816.

48 Virginia Acts of 1861-62, c. 50.

49 "But little has been done in the way of improving the river since the time of Moore and Briggs, though an effort is said to have been made in that direction by the confederate government in the late war" (Report of Chief of Engineers for 1873). "Experience as developed by the universal fate of the work of the late Confederate States on this river (though this seems to have been injudiciously located and poorly built), is adverse to anything like rigid structures . . ." (Report of Chief of Engineers for 1879).

50 Testimony of Snyder, Snidow, Skeen.

51 107 F. (2d) at 783.

52 See 23 F. Supp. at 93; 107 F. (2d) at 786.

Testimony of bateaux going from Radford, or above, to Hinton, is given by Flannagan, Linkous, Collins, Webb, Snyder.

A boat, 50 feet by 8, with a gasoline motor, went from Radford to Hinton in 1901, though after the river had been materially raised by a rain.

boating along parts of the Radford-Wiley's Falls reach.[53] And when the Government stopped improvement in 1883, it ordered the boats it was using in the lead mines' division above Allisonia, and at various places downstream, to be brought down the full stretch of the river to Hinton for sale. Under the supervision of the assistant engineer, a derrick boat, four bateaux, and numerous flat boats, skiffs and canoes—more than twenty vessels in all—were taken down to Hinton, a number of them from points above Radford. This was accomplished, as the Chief of Engineers' report shows, despite difficulties occasioned by "weather, low water, and scarcity of labor."[54]

In addition to the testimony of use in the days before railways and good roads, there was a demonstration of the possibility of navigation by a government survey boat with an outboard motor, 16 feet long, five feet wide, drawing 2½ to 3 feet, loaded with a crew of five and its survey equipment. This boat made a round trip from the Narrows, just above Wiley's Falls, to Allisonia, a distance of 72 miles one way, in July, 1936, when the river stage was normal summer low water. While the crew was out of the boat and used poles a number of times, there were no carries or portages. Going upstream it was not necessary to pull or push the boat more than a mile and a quarter and not more than a few hundred feet on the return trip.

Use of a stream long abandoned by water commerce is difficult to prove by abundant evidence. Fourteen authenticated instances of use in a century and a half by explorers and trappers, coupled with general historical references to the river as a water route for the early fur traders and their supplies in pirogues and Durham or flat-bottomed craft similar to the keelboats of the New, sufficed upon that phase in the case of the DesPlaines.[55] Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.[56]

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[53] E. g., testimony of Coleman, Howard, Webb, Snyder, Price, Martin, Anderson.

[54] Report of the Chief of Engineers for 1883. See also testimony of Owen, Crowell, Dickinson.

[55] Economy Light Co. *v.* United States, 256 Fed. 792, 797-98; affirmed 256 U. S. 113.

[56] United States *v.* Utah, 283 U. S. 64, 82.

The evidence of actual use of the Radford-Wiley's Falls section for commerce and for private convenience, when taken in connection with its physical condition make it quite plain that by reasonable improvement the reach would be navigable for the type of boats employed on the less obstructed sections. Indeed the evidence detailed above is strikingly similar to that relied upon by this Court in *United States* v. *Utah*[57] to establish the navigability of the Colorado from Cataract Canyon to the Utah-Arizona boundary line. There had been seventeen through trips over a period of sixty years from the original exploration; and these together with sporadic trips on parts of the stretch, and considerable use—in connection with gold placer mining—of other parts from 1888 to 1915, sufficed to sustain navigability.[58]

*Effect of Improvability.* Respondent denied the practicability of artificial means to bring about the navigability of the New River and the effectiveness of any improvement to make the river a navigable water of the United States. The Government supported its allegation of improvability by pointing out that the use of the section for through navigation and local boating on favorable stretches of the Radford-Wiley's Falls reach showed the feasibility of such use and that little was needed in the way of improvements to make the section a thoroughfare for the typical, light commercial traffic of the area. Keelboats, eight feet wide, drawing two feet, were the usual equipment. In the 1872 report of the Chief of Engineers, Major Craighill in charge of New River reports that to get "good sluice navigation of 2 feet at all times" for 54 miles up from the mouth of the Greenbrier River, near Hinton, would cost $30,000 and for 128 miles, Greenbrier to the lead mines (above Allisonia), would cost $100,000. The depth over the shoals could be increased to 2 feet without "too much increase of velocity of the current." This recommendation was based on Hutton's mile-by-mile survey and includes all of the Radford-Wiley's Falls section.

The improvements were undertaken beginning in 1877. As the region was becoming better developed, a higher type of improvement became desirable, wider sluice ways and a deeper channel, usable by small steamboats. Work went forward above Hinton and above Radford to meet the pressing demands of the communities. Annual

[57] 283 U. S. 64, 81.

[58] See the Report of the Master, p. 127 *et seq.*

reports of the Chief of Engineers assumed or reaffirmed the navigability of the entire river above Hinton and the practicality of the improvements.[59] By 1891, $109,733.21 had been spent. It was in that year estimated $159,000 more would be required to complete the project the full length from Wilson Creek to Hinton.[60] Useful navigation moved regularly between Hinton and near Glen Llyn and between Radford and Allisonia. About half the reach between Hinton and Allisonia was improved. The Radford-Wiley's Falls section was never improved. It was reported that conditions had changed and the project should not be completed.[61] The provisions for improvements were repealed in 1902.[62] By 1912 the region's need for use of the river had so diminished that the army engineers advised against undertaking improvements again, and even referred to the cost as "prohibitive."[63] From the use of the Radford-Wiley's Falls stretch and the evidence as to its ready improvability at a low cost for easier keelboat use, we conclude that this section of the New River is navigable. It follows from this, together with the undisputed commercial use of the two stretches above Radford and Hinton, that the New River from Allisonia, Virginia, to Hinton, West Virginia, is a navigable water of the United States.

*License Provisions.* The determination that the New River is navigable eliminates from this case issues which may arise only where the river involved is nonnavigable.[64] But even accepting the navigability of the New River, the respondent urges that certain provisions of the license, which seek to control affairs of the licensee, are unconnected with navigation and are beyond the power of the Commission, indeed beyond the constitutional power of Congress to authorize.

The issue arises because of the prayer of the bill that the respondent be compelled to accept the license as required by law or remove the dam as an obstruction and the answer of the respondent

[59] Report for 1878, pp. 69, 495-99; 1879, pp. 79, 530-45; 1880, pp. 107-08, 676-81; 1881, pp. 144-45, 904-11; 1882, pp. 140-42, 913-19; 1883, pp. 144-45, 699-705; 1886, pp. 281-82, 1599-1602.

[60] Report of the Chief of Engineers for 1891, p. 303.

[61] *Id.*, at 302-303.

[62] 32 Stat. 374.

[63] House Doc. No. 1410, 62nd Cong., 3d Sess., p. 3.

[64] Cf. United States *v.* Appalachian Electric Power Co., 107 F. (2d) 769, 793 *et seq.*

that the license required by law and tendered to it by the Commission contains provisions, unrelated to navigation or the protection of navigable capacity, which are beyond the constitutional authority of Congress to require on account of the Fifth and Tenth Amendments. There is no contention that the provisions of the license are not authorized by the statute. In the note below[65] the chief statutory conditions for a license are epitomized. The license offered the respondent on May 5, 1931, embodied these statutory requirements and we assume it to be in conformity with the existing administration of the Power Act. We shall pass upon the validity of only those provisions of the license called to our attention by the respondent as being unrelated to the purposes of navigation. These are the conditions derived from sections 10a, 10c, 10d, 10e and 14. We do not consider that the validity of other clauses has been raised by the respondent's general challenge to the constitutionality of any provision "other than those relating solely to the protection" of navigable waters.[66] It should also be noted

[65] § 4(a) of the Act allows the Commission to regulate the licensee's accounts.

§ 6 limits licenses to 50 years.

§ 8 requires Commission approval for voluntary transfers of licenses or rights granted thereunder.

§ 10(a), as amended in 1935, requires that the project be best adapted to a comprehensive plan for improving or developing the waterway for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes. Under § 10(c) the licensee must maintain the project adequately for navigation and for efficient power operation, must maintain depreciation reserves adequate for renewals and replacements, and must conform to the Commission's regulations for the protection of life, health and property; (d) out of surplus earned after the first 20 years above a specified reasonable rate of return, the licensee must maintain amortization reserves to be applied in reduction of net investment; (e) the licensee must pay the United States reasonable annual charges for administering the Act, and during the first 20 years the United States is to expropriate excessive profits until the state prevents such profits; (f) the licensee may be ordered to reimburse those by whose construction work it is benefited.

By § 11, for projects in navigable waters of the United States the Commission may require the licensee to construct locks, etc., and to furnish the United States free of cost (a) lands and rights-of-way to improve navigation facilities, and (b) power for operating such facilities.

§ 14 gives the United States the right, upon expiration of a license, to take over and operate the project by paying the licensee's "net investment" as defined, not to exceed fair value of the property taken. However, the right of the United States or any state or municipality to condemn the project at any time is expressly reserved.

§ 19 allows state regulation of service and rates; if none exists, the Commission may exercise such jurisdiction.

[66] Denver Stock Yard Co. *v.* United States, 304 U. S. 470, 484; Pacific States Co. *v.* White, 296 U. S. 176, 184.

that no complaint is made of any conditions of the license dependent upon the authorization of § 10g, the omnibus clause requiring compliance with such other conditions as the Commission may require.

The petitioner suggests that consideration of the validity of section 14, the acquisition clause, and the license conditions based upon its language are properly to be deferred until the United States undertakes to claim the right to purchase the project on the license terms fifty years after its issuance.[67] Assuming that the mere acceptance of a license would not later bar the objection of unconstitutional conditions, even when accompanied by a specific agreement to abide by the statute and license,[68] we conclude that here the requirements of section 14 so vitally affect the establishment and financing of respondent's project as to require a determination of their validity before finally adjudging the issue of injunction.

The respondent's objections to the statutory and license provisions, as applied to navigable streams, are based on the contentions (1) that the United States' control of the waters is limited to control for purposes of navigation, (2) that certain license provisions take its property without due process, and (3) that the claimed right to acquire this project and to regulate its financing, records and affairs, is an invasion of the rights of the states, contrary to the Tenth Amendment.

Forty-one states join as amici in support of the respondent's arguments. While conceding, as of course, that Congress may prohibit the erection in navigable waters of the United States of any structure deemed to impair navigation, the Attorneys General speaking for the states insist that this power of prohibition does not comprehend a power to exact conditions, which are unrelated to navigation, for the permission to erect such structures. To permit, the argument continues, the imposition of licenses involving conditions such as this acquisition clause, enabling the Federal Government to take over a natural resource such as water-power, allows logically similar acquisition of mines, oil or farmlands as consideration for the privilege of doing an interstate business. The states thus lose control of their resources and property is withdrawn from taxation in violation of the Tenth Amendment.

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[67] Cf. Electric Bond & Share Co. *v.* Securities and Exchange Comm., 303 U. S. 419, 435; W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 468; New Jersey *v.* Sargent, 269 U. S. 328, 339.

[68] Section 6.

Further, the point is made that a clash of sovereignty arises between the license provisions of the Power Act and state licensing provisions. The Commonwealth of Virginia advances forcibly its contention that the affirmative regulation of water-power projects on its navigable streams within its boundaries rests with the state, beyond that needed for navigation. "While the supremacy of the Federal Government in its own proper sphere, as delineated in the Constitution, is cheerfully conceded, yet just as earnestly does Virginia insist upon the supremacy of her own government in its proper field as established by that instrument." Virginia has a Water Power Act.[69] It, too, offers a fifty-year license, with the right to use the natural resources of the state, the stream flow and the beds of the water courses for the period of the license or its extensions subject to state condemnation at any time on Virginia's terms for ascertainment of value. Operation is likewise regulated by state law.[70] The Commonwealth objects that the development of its water power resources is subjected to Federal Power Act requirements such as are detailed above in stating the respondent's objection, even to the point that Virginia itself may not build and operate a dam in navigable water without authorization and regulation by the Federal Government.

The briefs and arguments at the bar have marshaled reasons and precedents to cover the wide range of possible disagreement between Nation and state in the functioning of the Federal Power Act. To predetermine, even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions.[71] The possibility of other uses of the coercive power of license, if it is here upheld, is not before us. We deem the pictured extremes irrelevant save as possibilities for consideration in determining the present question of the validity of the challenged license provisions. To this we limit this portion of our decision.[72]

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69 Michie's 1936 Code, §§ 3581 (1)-(16).

70 Michie's 1936 Code, §§ 4065a, 4066.

71 Cherokee Nation *v.* Georgia, 5 Pet. 1, 75; United States *v.* West Virginia, 295 U. S. 463, 474; New Jersey *v.* Sargent, 269 U. S. 328; cf. McGuinn *v.* High Point, 217 N. C. 449, 458.

72 Ashwander *v.* Tennessee Valley Authority, 297 U. S. 288, 339.

The respondent is a riparian owner with a valid state license to use the natural resources of the state for its enterprise. Consequently it has as complete a right to the use of the riparian lands, the water, and the river bed as can be obtained under state law. The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce.[73] The power flows from the grant to regulate, i. e., to "prescribe the rule by which commerce is to be governed."[74] This includes the protection of navigable waters in capacity as well as use.[75] This power of Congress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character.[76] The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable." Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.[77]

Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license.[78] This power is exercised through section 9 of the Rivers and Harbors Act of 1899 prohibiting construction without Congressional consent and through section 4(e) of the present Power Act.

It is quite true that the criticized provisions summarized above are not essential to or even concerned with navigation as such. Respondent asserts that the rights of the United States to the use of

[73] New Jersey *v.* Sargent, 269 U. S. 328, 337; United States *v.* River Rouge Co., 269 U. S. 411; 419; United States *v.* Cress, 243 U. S. 316, 320; Willink *v.* United States, 240 U. S. 572, 580; United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 62; Gibson *v.* United States, 166 U. S. 269, 271.

[74] Gibbons *v.* Ogden, 9 Wheat. 1, 196.

[75] Gilman *v.* Philadelphia, 3 Wall. 713, 725.

[76] United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 64, 65; Union Bridge Co. *v.* United States, 204 U. S. 364, 400; cf. Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518, 18 How. 421.

[77] United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 66, 69, 76; cf. Ashwander *v.* Tennessee Valley Authority, 297 U. S. 288, 330.

[78] Greenleaf Lumber Co. *v.* Garrison, 237 U. S. 251, 268; United States *v.* Rio Grande Irrigation Co., 174 U. S. 690, 707.

e waters is limited to navigation. It is pointed out that the fed-al sovereignty over waters was so described in *Port of Seattle* v. *regon & Washington Railroad Company*,[79] *United States* v. *Ore-n*,[80] *Kansas* v. *Colorado*,[81] *United States* v. *River Rouge Com-any*,[82] and *Wisconsin* v. *Illinois*.[83] The first two of these cases ntered around the issue of title to land under navigable water. othing further was involved as to the use of the water than its avigability. In *Kansas* v. *Colorado* the point was the Govern-ent's advocacy of the doctrine of sovereign and inherent power justify the United States taking charge of the waters of the rkansas to control the reclamation of arid lands (pp. 85-89). here was found no constitutional authority for irrigation in the ommerce clause or the clause relating to property of the United tates.[84] It cannot be said, however, that the case is authority for miting federal power over navigable waters to navigation,[85] es-ecially since the stretch of the Arkansas River involved in the dis-ute was asserted by the Government to be nonnavigable (p. 86). In he *River Rouge* controversy, this Court spoke of the limitation "to he control thereof for the purposes of navigation." But there, oo, it was a question of the riparian owner's use of his property or access to the channel, a use fixed by state law. The conclusion hat the United States could not interfere, except for navigation, vith his right of access to navigable water, required no appraisal f other rights. *Wisconsin* v. *Illinois* is a part of the Chicago Drainage Canal litigation. In so far as pertinent here, it merely ecided that under a certain federal statute[86] there was no authority or diversion of the waters of Lake Michigan for sanitary purposes p. 418). There is no consideration of the constitutional power to se water for other than navigable purposes, though it is plain that ther advantages occur (pp. 415, 419).

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79 255 U. S. 56, 63.
80 295 U. S. 1, 14.
81 206 U. S. 46, 85-86.
82 269 U. S. 411, 419.
83 278 U. S. 367, 415.
84 Art. IV, § 3, cl. 2.
85 Cf. United States *v.* Hanson, 167 Fed. 881, 884; Cincinnati Soap Co. *v.* United States, 301 U. S. 308, 322.
86 Cf. Sanitary District *v.* United States, 266 U. S. 405, 428.

In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.[87] As respondent soundly argues, the United States cannot by calling a project of its own "a multiple purpose dam" give to itself additional powers, but equally truly the respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce. To this general power, the respondent must submit its single purpose of electrical production. The fact that the Commission is willing to give a license for a power dam only is of no significance in appraising the type of conditions allowable. It may well be that this portion of the river is not needed for navigation at this time. Or that the dam proposed may function satisfactorily with others, contemplated or intended. It may fit in as a part of the river development. The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that "its exercise is attended by the same incidents which attend the exercise of the police power of the states."[88] The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment.

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87 Cf. Ashwander *v.* Tennessee Valley Authority, 297 U. S. 288.

88 United States *v.* Carolene Products Co., 304 U. S. 144, 147. Cf. Mulford *v.* Smith, 307 U. S. 38, 48.

The respondent urges that as riparian owner with state approval of its plans, if is entitled to freedom in the development of its property and particularly cannot be compelled to submit to the acquisition clause with a price fixed at less than a fair value, in the eminent domain sense, at the time of taking. Such a taking, it is contended, would violate the Fifth Amendment. It is now a question whether the Government in taking over the property may do so at less than a fair value. It has been shown, note 77, *supra*, that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined,[89] for the fast land; nothing for the water power.[90] We assume without deciding that by compulsion of the method of acquisition provided in section 14 of the Power Act and the tendered license, these riparian rights may pass to the United States for less than their value. In our view this "is the price which [respondents] must pay to secure the right to maintain their dam." The quoted words are the conclusion of the opinion in *Fox River Company* v. *Railroad Commission*.[91] The case is decisive on the issue of confiscation. It relates to an acquisition clause in a Wisconsin license by which a dam in navigable water of the state might be taken over at such a price as would, this Court assumed, amount to violation of the due process clause of the Fourteenth Amendment if it were not for the license provision. Title to the bank and bed were in the objector, just as, by virtue of the state's license and the riparian ownership, all rights here belong to respondent. There, as here, the rights were subject to governmental "control of navigable waters."[92] The fact that the *Fox River* case involved a state and that this case involves the United States is immaterial from the due process standpoint. Since the United States might erect a structure in these waters itself, even one equipped for electrical generation,[93] it may constitutionally acquire one already built.

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89 Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 327.

90 United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 66, 76.

91 274 U. S. 651.

92 *Id.*, 656.

93 Ashwander *v.* Tennessee Valley Authority, 297 U. S. 288; Arizona *v.* California, 283 U. S. 423.

Such an acquisition or such an option to acquire is not an invasion of the sovereignty of a state. At the formation of the Union, the states delegated to the Federal Government authority to regulate commerce among the states. So long as the things done within the states by the United States are valid under that power, there can be no interference with the sovereignty of the state. It is the non-delegated power which under the Tenth Amendment remains in the state or the people. The water power statutes of the United States and of Virginia recognize the difficulties of our dual system of government by providing, each in its own enactments, for the exercise of rights of the other.[94]

Reversed and remanded to the District Court with instructions to enter an order enjoining the construction, maintenance or operation of the Radford project otherwise than under a license, accepted by the respondent within a reasonable time, substantially in the form tendered respondent by the Federal Power Commission on or about May 5, 1931, or in the alternative, as prayed in the bill.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

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A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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[94] §§ 10e, 14 and 19 of the Federal Power Act; Michie's 1936 Virginia Code, § 3581(19).

# SUPREME COURT OF THE UNITED STATES.

No. 12.—October Term, 1940.

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| The United States of America, Petitioner, *vs.* Appalachian Electric Power Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. |

[December 16, 1940.]

Mr. Justice Roberts.

The judgment of reversal rests on the conclusion that New River is navigable,—a conclusion resting on findings of fact, made here *de novo*, and in contradiction of the concurrent findings of the two courts below. I am of opinion that the judgment of the Circuit Court of Appeals should be affirmed, first, because this court ought to respect and give effect to such concurrent findings which have substantial support in the evidence; secondly, because the evidence will not support contrary findings if the navigability of New River be tested by criteria long established.

1. A river is navigable in law if it is navigable in fact.[1] Indeed the issue of navigability *vel non* is so peculiarly one of fact that a determination as to one stream can have little relevancy in determining the status of another. As this court has said, "each determination as to navigability must stand on its own facts."[2]

The evidence supports,—indeed I think it requires,—a finding that, applying accepted criteria, New River is not, and never has been, in fact navigable. On this record the rule of decision, many times announced by this court, that the concurrent findings of fact of two lower courts, if supported by substantial evidence, will be accepted here, requires affirmance of the judgment. The rule applies not only to evidentiary facts but to conclusions of fact based there-

[1] Oklahoma *v.* Texas, 258 U. S. 574, 585, 590-1; Arizona *v.* California, 283 U. S. 423, 452; Crowell *v.* Benson, 285 U. S. 22, 55.

[2] United States *v.* Utah, 283 U. S. 64, 87.

on. Moreover, it has been the basis of this court's decision in a suit involving the question of navigability. Invoking the rule, this court, in *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U. S. 77, 86, declined to review a judgment based on a concurrent finding of two lower courts that a stream "was not, and had never been, navigable within the adjudged meaning of that term."

The cases cited for the proposition that where navigability was an issue this court has reconsidered the facts found by the courts below to determine whether they have correctly applied the proper legal tests do not, when the questions involved are understood, lend support to the action of the court in this case.[3]

The petitioner, in effect, asks this court to convict the courts below of error in determining the credibility, weight and relevance of the evidence. But that determination is peculiarly within their province, as this court has often said. The doctrine applies in this case with especial force. The respondent says, without contradiction, that the Government in its brief in the Circuit Court stated: "It cannot be said that the New River presents a 'clear case' of navigability or non-navigability . . . ". Yet this court is asked to ignore concurrent findings on the subject.

If the evidence may fairly support these findings, the courts below can be convicted of error only in applying an erroneous rule of law to the facts found.

Examination of the opinions below shows that the courts faithfully followed the decisions of this court in applying the law to the facts. They adopted the definition[4] and applied the criteria this court has announced in appraising the effect of the facts found.

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[3] The cases cited are United States *v.* Rio Grande Irrigation Co., 174 U. S. 690, 699, where this court said with respect to the findings: "We are not, therefore, disposed to question the conclusion reached," by the courts below; Leovy *v.* United States, 177 U. S. 621, where a judgment on a jury's verdict was reversed for error in the judge's instructions as to the criteria of navigability; Economy Light Co. *v.* United States, 256 U. S. 113, 117, where the court did not reexamine the facts but affirmed the judgment of the Circuit Court of Appeals, as that court had correctly applied the test laid down in The Daniel Ball; and United States *v.* Holt Bank, 270 U. S. 49, 55, where the courts below treated the question of navigability as one of local law to be determined by applying the rule adopted in Minnesota, and this court, though holding that they applied the wrong standard, as the question was one of federal law, affirmed the findings, instead of remanding the case, since the record disclosed that according to the right standard the water was navigable.

[4] Cf. The Daniel Ball, 10 Wall. 557; The Montello, 11 Wall. 411, 415; United States *v.* Oregon, 295 U. S. 1, 23.

As shown by the cases cited in the margin,[5] a stream to be navigable in fact must have "a capacity for general and common usefulness for purposes of trade and commerce". Exceptional use or capability of use at high water or under other abnormal conditions will not suffice. Moreover, the stream must be used, or available to use, "for commerce of a substantial and permanent character". Where the stream "has never been impressed with the character of navigability by past use in commerce, . . . commerce actually *in esse* or at least *in posse* is essential to navigability" and "a theoretical or potential navigability or one that is temporary, precarious and unprofitable is not sufficient." The most important criterion by which to ascertain the navigability of a stream is that navigability in fact must exist under "natural and ordinary conditions". Application of these tests by the court below to the evidence in the case led to but one conclusion,—that New River has not been, and is not now, a navigable water of the United States. If the findings below had been the other way, the Government would be here strenuously contending that they could not be set aside, as it successfully did in *Brewer-Elliott Oil & Gas Co.* v. *United States, supra.*

2. The petitioner contends that the application of the accepted tests to the facts disclosed amounts to a ruling of law, and asserts that error in their application is reviewable. As I read the court's opinion, the argument is not found persuasive. While apparently endorsing it in the abstract the court, instead of relying on it, adopts two additional tests in the teeth of the uniform current of authority. If anything has been settled by our decisions it is that, in order for a water to be found navigable, navigability in fact must exist under "natural and ordinary conditions". This means all conditions, including a multiplicity of obstacles, falls and rapids which make navigation a practical impossibility. The court now, however, announces that "natural and ordinary conditions" refers only to volume of water, gradients, and regularity of flow. No authority is cited and I believe none can be found for thus limiting the connotation of

[5] The Montello, 20 Wall. 430; United States *v.* Rio Grande Co., 174 U. S. 690; Leovy *v.* United States, 177 U. S. 621; Donnelly *v.* United States, 228 U. S. 243; United States *v.* Cress, 243 U. S. 316; Oklahoma *v.* Texas, 258 U. S. 574; United States *v.* Holt State Bank, 270 U. S. 49; United States *v.* Oregon, 295 U. S. 1; Harrison *v.* Fite, 148 Fed. 781; Gulf & I. Ry. Co. *v.* Davis, 26 F. (2d) 930, 31 F. (2d) 109; United States *v.* Doughton, 62 F. (2d) 936.

the phrase. But further the court holds, contrary to all that has heretofore been said on the subject, that the natural and ordinary condition of the stream, however impassable it may be without improvement, means that if, by "reasonable" improvement, the stream may be rendered navigable then it is navigable without such improvement; that "there must be a balance between cost and need at a time when the improvement would be useful." No authority is cited and I think none can be cited which countenances any such test. It is of course true that if a stream in its natural and ordinary condition is navigable it does not cease to be so because improvements have bettered the conditions of navigation.[6] But the converse is not true,—that where a stream in its natural and ordinary condition is non-navigable, a project to build a canal along its entire course, or dams and locks every few miles, at enormous expense, would render it a navigable water of the United States. Who is to determine what is a reasonable or an unreasonable improvement in the circumstances; or what is a proper balance between cost and need? If these questions must be answered it is for Congress, certainly not for this court to answer them. If this test be adopted, then every creek in every state of the Union which has enough water, when conserved by dams and locks or channelled by wing dams and sluices, to float a boat drawing two feet of water, may be pronounced navigable because, by the expenditure of some enormous sum, such a project would be possible of execution. In other words, Congress can create navigability by determining to improve a non-navigable stream.

If this criterion be the correct one, it is not seen how any stream can be found not to be navigable nor is it seen why this court and other federal courts have been at pains for many years to apply the other tests mentioned when the simple solution of the problem in each case would have been to speculate as to whether, at "reasonable" cost, the United States could render a most difficult and forbidding mountain torrent suitable for the least pretentious form of water traffic. In the light of the court's opinion, if this test be applied to the New River it must, of course, be admitted that by blasting out channels through reefs and shoals, by digging canals around falls and rapids, and possibly by dams and locks, the New

[6] Economy Light Co. *v.* United States, 256 U. S. 113.

River could be rendered fit for some sort of commercial use. What the expense would be no one knows. Obviously it would be enormous. Congress in the past has undertaken to render the river navigable and decades ago gave up the attempt. Still we are told that, at "reasonable" cost, the thing can be done, and so the stream is navigable.

In the light of the grounds upon which the decision of the court is based it hardly seems necessary to comment on the evidence, for it is in the main addressed to issues no longer in the case. The two courts below have analyzed it and examined it in detail and reference to their carefully considered opinions suffices.[7] I think the conclusion reached by the courts below must stand unless the two novel doctrines now announced be thrown into the scale to overcome it.

Mr. Justice McReynolds concurs in this opinion.

END

[7] 23 F. Supp. 83; 107 F. (2d) 769.